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Tan Sri Mohamad Salim bin Fateh Din v Dato' Daljit Singh a/l Gurdev Singh

B HIGH COURT (KUALA LUMPUR) — CIVIL CASE NO WA-23NCvC-30–06 OF 2023
ROZ MAWAR JC
4 FEBRUARY 2024

C *Civil Procedure — Pleadings — Striking out — Plaintiff sued defendant for defamation — Defendant filed counterclaim premised on tort of conspiracy and breach of duty of care — Application to strike out defendant's amended counterclaim — Whether defendant failed to plead cause of action of tort of conspiracy and breach of duty of care — Whether there was triable issue - Whether defendant's amended counterclaim obviously unsustainable — Whether defendant's amended counterclaim ought to be struck out — Rules of Court 2012 O 18 r 19(1)(a)*

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E The plaintiff had sued the defendant for defamation in relation to the defendant's words to a senior lawyer and to the editor-in-chief of a news portal. In response, the defendant alleged that his words were taken out of context. He further contended that he was merely expressing his deep sense of disappointment when the plaintiff allegedly failed to honour their agreement. The defendant then filed a counterclaim against the plaintiff and a company called Hedgeland Realty Sdn Bhd ('Hedgeland') premised on the tort of conspiracy and breach of duty of care. The defendant argued that the plaintiff either acting by himself and/or in concert with Hedgeland had deprived him his stake in the Karyaneka land acquisition amounted to RM17,680,000. It ought to be noted that the said acquisition was terminated in November 2018. The plaintiff then filed the present applications (encl 10 and encl 14) under O 18 r 19(1)(a) of the Rules of Court 2012 to strike out the defendant's counterclaim.

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H **Held**, striking out the defendant's amended counterclaim with no order as to costs:

(1) Pleadings provide the blueprint for the adjudication process. The amended counterclaim was required to meticulously delineate both the elements and particulars of the cause of action. For the tort of conspiracy, the defendant's pleadings were lacking to the extent that they did not disclose a reasonable cause of action. It was trite that a defective pleading could not be cured by any amendment. Therefore, the court concluded that the defendant's amended counterclaim was insufficient in law to sustain a reasonable cause of action of the tort of conspiracy against the

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plaintiff and Hedgeland. As it was plainly and obviously unsustainable, the defendant's amended counterclaim for the tort of conspiracy against the plaintiff and Hedgeland was struck out (see para 10).

(2) The defendant referred to a breach of contract in the arguments, but considering that breach of contract was not pleaded, the court refused to consider the submissions based on a breach of contract. The defendant after all must be bound by his own pleadings (see para 11).

(3) In relation to the breach of duty of care, the defendant's pleadings were silent as to what the duty of care was and how it had arisen. The court could not find any causation pleaded. There were no averments or pleadings that stated the involvement of the plaintiff and Hedgeland in the termination of the Karyaneka land acquisition. The primary function of the pleading was to plead a reasonable cause of action that must contain all material facts that fulfilled the elements of the alleged legal liability of those sued. The defendant's amended counterclaim that barely mentioned the breach of duty of care by Hedgeland could be regarded as embarrassment and prejudicial to Hedgeland in terms of defending the rather lack of cause of action (see paras 11–12).

(4) The defendant's reference to the Federal Court's decision of *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59 was considered by the court. However, in the present case, there was not a single triable issue in the defendant's amended counterclaim to make it sustainable. As such, the court was bound by the appropriate legal principle enunciated in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. The defendant's amended counterclaim was accordingly struck out with no order as to costs (see para 13).

(5) The court opined that with the fall of the defendant's amended counterclaim, he would not be prejudiced at trial. His pleaded defences of justification and qualified privilege were worlds apart from the tort of conspiracy and the breach of duty of care on which he had based his amended counterclaim. With confidence, the court stated that the defendant would still receive a fair trial — the hearing dates had been fixed (see para 14).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan kerana memfitnah berhubung dengan kata-kata defendan kepada seorang peguam kanan dan kepada ketua pengarang sebuah portal berita. Sebagai tindak balas, defendan mendakwa bahawa kata-katanya telah diambil di luar konteks. Dia seterusnya menegaskan bahawa dia hanya meluahkan rasa kecewanya yang mendalam apabila plaintif didakwa gagal mematuhi perjanjian mereka. Defendan kemudian memfailkan

tuntutan balas terhadap plaintif dan sebuah syarikat bernama Hedgeland Realty Sdn Bhd ('Hedgeland') berdasarkan tort konspirasi dan pelanggaran kewajipan berjaga-jaga. Defendan berhujah bahawa plaintif sama ada bertindak secara sendiri dan/atau bersama Hedgeland telah menafikan kepentingannya dalam pengambilan tanah Karyaneka berjumlah RM17,680,000. Perlu diingat bahawa pengambilan tersebut telah dibatalkan pada November 2018. Plaintif kemudiannya memfailkan permohonan semasa (lampiran 10 dan 14) di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 untuk membatalkan tuntutan balas defendan.

Diputuskan, membatalkan tuntutan balas terpinda defendan tanpa perintah berkaitan kos:

(1) Pliding menyediakan rangka tindakan untuk proses adjudikasi. Tuntutan balas terpinda tersebut perlu untuk menggambarkan dengan teliti kedua-dua elemen dan butiran kausa tindakan. Bagi tort konspirasi, pliding defendan adalah tidak mencukupi sehingga tahap ia tidak mendedahkan kausa tindakan yang munasabah. Sudah menjadi undang-undang yang mantap bahawa pliding yang cacat tidak dapat dipulihkan dengan apa-apa pindaan. Oleh itu, mahkamah membuat kesimpulan bahawa tuntutan balas terpinda defendan tidak mencukupi di sisi undang-undang untuk mengekalkan kausa tindakan tort konspirasi yang munasabah terhadap plaintif dan Hedgeland. Memandangkan ia jelas dan nyata tidak mampan, tuntutan balas terpinda defendan untuk tort konspirasi terhadap plaintif dan Hedgeland telah dibatalkan (lihat perenggan 10).

(2) Defendan merujuk kepada pelanggaran kontrak dalam hujahnya, tetapi memandangkan pelanggaran kontrak tidak diplid, mahkamah enggan mempertimbangkan hujah berdasarkan pelanggaran kontrak. Walau apa pun, defendan adalah terikat dengan plidingnya sendiri (lihat perenggan 11).

(3) Berhubung dengan pelanggaran kewajipan berjaga-jaga, pliding defendan tidak menyatakan apa-apa tentang apakah kewajipan berjaga-jaga tersebut dan bagaimana ia timbul. Mahkamah tidak menemui apa-apa kausa yang diplid. Tiada penegasan atau pliding yang menyatakan penglibatan plaintif dan Hedgeland dalam pembatalan pengambilan tanah Karyaneka tersebut. Fungsi utama pliding adalah untuk memplid kausa tindakan yang munasabah yang mesti mengandungi semua fakta material yang memenuhi unsur-unsur liabiliti undang-undang yang didakwa bagi mereka yang disaman. Tuntutan balas terpinda defendan yang hampir tidak menyebut pelanggaran kewajipan berjaga-jaga oleh Hedgeland boleh dianggap sebagai memalukan dan memudaratkan Hedgeland dari segi mempertahankan kausa tindakan yang tidak mencukupi (lihat perenggan 11–12).

(4) Rujukan defendan kepada keputusan Mahkamah Persekutuan dalam kes *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59 telah dipertimbangkan oleh mahkamah. Walau bagaimanapun, dalam kes semasa, tiada satu pun isu yang boleh dibicarakan dalam tuntutan balas terpinda defendan untuk menjadikannya mampan. Oleh itu, mahkamah terikat dengan prinsip undang-undang yang sewajarnya yang dinyatakan dalam *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. Oleh itu, tuntutan balas terpinda defendan telah dibatalkan tanpa perintah berkaitan kos (lihat perenggan 13).

(5) Mahkamah berpendapat bahawa dengan pembatalan tuntutan balas terpinda defendan, dia tidak akan diprejudiskan semasa perbicaraan. Pembelaan-pembelaannya iaitu pembelaan justifikasi dan perlindungan bersyarat adalah bagai langit dengan bumi berbanding tort konspirasi dan pelanggaran kewajipan berjaga-jaga yang menjadi asas tuntutan balas terpindanya. Dengan yakin, mahkamah menyatakan bahawa defendan masih akan menerima perbicaraan yang adil — tarikh perbicaraan telah ditetapkan (lihat perenggan 14).]

Cases referred to

Amber Contract Sdn Bhd v Khairi Consult Sdn Bhd & Anor [2023] 1 LNS 1263, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (folld)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 2 CLJ 676, CA (refd)

Dato Seri Hishammuddin Tun Hussein v Dato Seri Anwar Ibrahim [2011] 1 LNS 1189, HC (refd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (folld)

Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (folld)

Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520; [2013] 8 CLJ 341, CA (distd)

Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd [1997] 1 MLJ 557; [1997] 1 CLJ 417, CA (distd)

Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals [2019] 1 MLJ 59; [2018] 9 CLJ 425, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1)(a)

Dhinesh Bhaskaran (with Serena Azizudin and Wong Jia Jing) (Shearn Delamore & Co) for the plaintiff.
Nirumala a/p Pusudoray (with Harjinder a/l Saudagar) (Aziz Doray & Assoc) for the defendant.
Aarthi a/p S Jeyarajah (with Jayasri a/p Ravichanthiran) (Aarthi & Assoc) for the aggrieved party.

Roz Mawar JC:

[1] Where truth is our lodestar and fairness our compass, the case before this court requires it to determine the dispute concerning the reputation of a prominent figure, the plaintiff. He stands aggrieved before this court, his reputation allegedly tarnished by the defendant's words, made to a senior lawyer and to the editor-in-chief of a news portal. The plaintiff claims to be a victim of defamation, an accusation as potent as it is perilous. On the other side of the courtroom, the defendant, far from contrite, maintains that his words were taken out of context. He contends that he was merely expressing his deep sense of disappointment and the feeling of being cheated when the plaintiff, according to the defendant, failed to honour their agreement. The defendant had filed a counterclaim against the plaintiff (their references remain in this grounds of judgment) and a company called Hedgeland Realty Sdn Bhd ('Hedgeland'). The defendant claimed the plaintiff either acting by himself and/or in concert with Hedgeland had deprived him of his stake in the Karyaneka land acquisition amounted to RM17.68m which he is counterclaiming against them. Aggravated and exemplary damages were also prayed for.

[2] This court, upon the scrutiny of the pleadings and after hearing the submissions of the parties, had allowed the applications by the plaintiff and Hedgeland (encls 10 and 14 respectively) to strike out the defendant's counterclaim. This court found that as per the applications under O 18 r 19(1)(a) Rules of Court 2012 ('the ROC') this was a plain and obvious case where the cause of action in the defendant's counterclaim was plainly and obviously unsustainable. Costs of RM3,000 was ordered to be paid forthwith by the defendant.

THE COUNTERCLAIM

[3] The defendant stated that he was approached by the plaintiff in 2015 to assist and facilitate in the acquisition of the land occupied by Karyaneka at Jalan Conlay, Kuala Lumpur ('Karyaneka land'). The defendant claimed that

the plaintiff represented that he had instructions from the then Prime Minister YABhg Dato Seri Mohd Najib Tun Razak to acquire the Karyaneka land to develop a new UMNO headquarters. It was to be undertaken by Malaysian Resources Corp Bhd ('MRCB') which the plaintiff was the Deputy Chairman at that material time. The defendant pleaded that he was promised 2% of the acquisition price for facilitating the acquisition of the Karyaneka land — it was pleaded that the defendant had facilitated the meetings with Dato Seri Nazri Aziz (the then Minister of Tourism) and other officials at various ministries. According to the defendant, the approval was given on 13 October 2017 and the Karyaneka land was acquired at RM925m where the plaintiff had bandied a sum of RM40m as payment to the defendant. The plaintiff had appointed the defendant as advisor to one of MRCB's subsidiaries on 12 September 2017 as partial payment. The defendant claimed that after the 13th General Elections on 9 May 2018 the plaintiff worried to be associated with the then Prime Minister and Datin Sri Rosmah Mansor so the plaintiff suggested that he should try to convince the Ministry of Finance to abort the Karyaneka land acquisition to which the defendant protested to. In November 2018, the said acquisition was terminated. The defendant claimed he had an interest in the said acquisition and that Hedgeland whether by itself or in concert with the plaintiff had acted in disregard to the duty of care they had to the defendant. It was alleged that they had deprived the defendant of his stake in the acquisition. The sum of RM17.68m was said to be the balance of the acquisition price owed to the defendant by the plaintiff and Hedgeland.

A B C D E

TORT OF CONSPIRACY

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[4] This court searched the counterclaim for elements of the tort of conspiracy. It lacked a pleading of an agreement between the plaintiff and Hedgeland. The Court of Appeal in *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 2 CLJ 676 had affirmed the elements of the tort of conspiracy that were failed to be pleaded in the counterclaim. In fact, it was not pleaded whether the plaintiff had actually convinced the Ministry of Finance to terminate/abort the Karyaneka land acquisition. Hedgeland's role in the conspiracy was not pleaded. There was an absence of a statement on their intent to injure the defendant; in fact, nothing was pleaded as to their intent and objective. The defendant had failed to plead the acts carried out by the plaintiff and Hedgeland pursuant to their conspiracy and intention. His counterclaim was silent as to how their acts resulted in loss and damage.

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[5] The defendant's claim that the shareholders/directors/principals of Hedgeland were connected and/or related to the plaintiff is only a bare statement. It did not tantamount to a conspiracy by the plaintiff and Hedgeland. There was no agreement to conspire against the defendant that was pleaded. The plaintiff, Hedgeland and this court were left to guess what kind of

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agreement the defendant had meant, whether it was formal or informal, or a combination of efforts by them all. No mention of when, what, who, how or why the agreement to conspire to deprive the defendant of its purported stake in the Karyaneka land acquitistion was made. The pleading that that the plaintiff acted 'either by himself, and/or in concert with Hedgeland and/or with persons unknown' is most certainly insufficient to state a cause of action under the tort of conspiracy.

[6] This court agrees with the submissions by the learned counsel for the plaintiff that pleading in itself, negated the existence of any agreement to conspire as if he had acted alone then he did not conspire with any other party. On the other hand, the defendant must specifically plead the identity of the persons unknown. All the conspirators are required to be named and pleaded. In the defendant's amended counterclaim their identities and involvement in the alleged conspiracy was missing, not pleaded.

[7] The defendant had also failed to plead that the plaintiff and Hedgeland had intended to injure him. The element that the agreement was made for the purpose of injuring the defendant needed to be pleaded. The counterclaim was further barren of the details/particulars of the acts undertaken by the plaintiff and Hedgeland in carrying out their purported conspiracy.

[8] Apart from the observation that it was pleaded by the defendant that it was MRCB and not the plaintiff that purportedly agreed to pay 2% of the acquisition price to the defendant, it was stated that the termination of the acquisition was made after a new government was established pursuant to the general elections in 2018. There are no other facts pleaded to thread the case against the plaintiff and the Hedgeland in the counterclaim, of the the defendant's allegation that they had conspired against him for the termination of the Karyaneka land acquisition to deprive him of the purported 2% payment promised.

[9] The pleading that stated 'the actions of Hedgeland, either acting by itself or in concert with the plaintiff, were in disregard of the duty of care to the defendant as stakeholder in the acquisition' was confusing. It was not clear as to who had owed the defendant that alleged duty of care — whether it was the plaintiff of Hedgeland. There was no elaboration on this or further facts that would have explained how that duty, if at all, arose and thereafter breached. This court was reminded by the defendant that he had filed an application to amend his defence and counterclaim ('encl 49') which had yet to be heard. To this, it is observed that the defendant had filed his defence and amended counterclaim ('encl 8') on 4 August 2023 a day after it had filed its initial defence and counterclaim. This application by the plaintiff ('encl 10') was filed on 18 August 2023, the same day he filed in his reply to the defence and

defence to the defendant's amended counterclaim. On 20 August 2023 this court fixed the hearing for encl 10. Two days later, on 22 August 2023 Hedgeland filed its application to strike out the defendant's counterclaim ('encl 14'). It was fixed to be heard together with encl 10, then one month later, on 20 September 2023 the defendant filed in his application to amend his defence and amended counterclaim, which was the same day as his filing for interrogatories against Hedgeland. On 13 October 2023 Hedgeland responded to the defendant's interrogatories. On 20 October 2023 the plaintiff filed interrogatories to the plaintiff. Submissions by all parties were filed for the defendant's application to amend his amended defence and counterclaim as well as encls 10 and 14. But, on 8 November 2023 just before the hearing of the arguments for encls 10 and 14, the defendant withdrew his application to amend his defence and amended counterclaim. The reason given was that he would be making a new application. The court allowed the withdrawal and awarded costs to the plaintiff and Hedgeland. Then on 14 November 2023 the new application by the defendant was filed ('encl 49'). In exercising fairness, this court decided not to regard encl 49 in its assessment of the applications to strike out by the plaintiff and Hedgeland (encls 10 and 14). The circumstances in which encl 49 was filed did not warrant it to be heard before encls 10 and 14 where the papers were already in order for this court's deliberation. Thus, as bound by the decision of the Court of Appeal in *Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192, this court's consideration for encls 10 and 14 made under O 18 r 19(1)(a) of the ROC was based on the pleadings before it — the defendant's defence and amended counterclaim ('encl 8'), the plaintiff's statement of claim ('encl 2'), the plaintiff's reply to the defendant's amended defence and counterclaim ('encl 9'), Hedgeland's defence to the defendant's counterclaim ('encl 17'), the defendant's reply to Hedgeland's defence to the defendant's counterclaim ('encl 23') and the defendant's reply to the plaintiffs defence to the defendant's counterclaim which was allowed by the court ('encl 38'). This court had also disregarded interrogatories as they did not form part of encl 10. The plaintiff had highlighted that there was yet an application by the defendant to require the plaintiff to answer them. Likewise, this court had neither regarded the interrogatories pertaining to Hedgeland as they did not form part of encl 14.

[10] Pleadings provide the blueprint for the adjudication process. The amended counterclaim was required to meticulously delineate both the elements and particulars of the cause of action. For the tort of conspiracy, the defendant's pleadings were lacking to the extent that they did not disclose a reasonable cause of action. It is trite that a defective pleading cannot be cured by any amendment. The facts in the authorities cited by the defendant — *Muniandy s/o Subrayan & Ors v Chairman & Board Members of Koperasi Menara Maju Bhd* [1997] 1 MLJ 557; [1997] 1 CLJ 417 and *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; [2013] 8 CLJ 341 were distinguished — the defendant's amended

counterclaim itself lacked particularisation of the elements of the cause of action, not details of facts to the elements pleaded (see *Dato Seri Hishammuddin Tun Hussein v Dato Seri Anwar Ibrahim* [2011] 1 LNS 1189). This court concluded that the defendant's amended counterclaim was insufficient in law to sustain a reasonable cause of action of the tort of conspiracy against the plaintiff and Hedgeland. As it was plainly and obviously unsustainable, the defendant's amended counterclaim for the tort of conspiracy against the plaintiff and Hedgeland was struck out.

BREACH OF A DUTY OF CARE

[11] In the arguments, the defendant referred to a breach of contract. Since it was not pleaded, this court refused to consider submissions based on a breach of contract. The defendant after all must be bound by his own pleadings (see *Amber Contract Sdn Bhd v Khairi Consult Sdn Bhd & Anor* [2023] 1 LNS 1263). As to the breach of the duty of care, the defendant pleaded in his amended counterclaim that 'the actions of Hedgeland, either acting by itself or in concert with the plaintiff, were in disregard of a duty of care to the defendant as a stakeholder in the acquisition'. His pleadings were silent as to what the duty of care was and how it has arose. This court could not find any causation pleaded — there was a bare statement that MRCB was to pay the defendant 2%, not the plaintiff nor Hedgeland. Again, for this, there were no averments or pleadings that state the plaintiff and Hedgeland's involvement in the termination of the Karyaneka land acquisition.

[12] The decision to strike out pleadings was always one that this court make upon their close scrutiny as litigants ought not to be deprived the opportunity to prove the case they pleaded. This court was guided by the Court of Appeal's affirmation in *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174 to the legal principle that the primary function of the pleading is to plead a reasonable cause of action that must contain all material facts that fulfil the elements of the alleged legal liability of those sued. The defendant's amended counterclaim that bareiy mentioned the breach of duty of care by Hedgeland could be regarded as embarrassment and prejudicial to Hedgeland in terms of defending the rather lack of cause of action.

[13] The defendant's reference to the Federal Court's decision of *Tan Wei Hong (a minor suing through guardian ad litem and next friend Chuang Yin E) & Ors v Malaysia Airlines Bhd and other appeals* [2019] 1 MLJ 59; [2018] 9 CLJ 425 was considered. However, in this case, there is not a single triable issue in his amended counterclaim to make it sustainable. As such, this court was bound by the appropriate legal principal enunciated in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36. The

defendant's amended counterclaim was accordingly struck out. There was no order as to costs.

[14] This court opined that with the fall of the defendant's amended counterclaim, he would not be prejudiced at trial. His pleaded defences are justification and qualified privilege. Those are worlds apart from the tort of conspiracy and the breach of duty care on which he had based his amended counterclaim. With confidence, this court stated that the defendant would still receive a fair trial — the hearing dates have been fixed.

Defendant's amended counterclaim struck out with no order as to costs.

Reported by Dzulqarnain Ab Fatar